BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MIRNA T. ARROYO	)	
Claimant	)	
VS.	)	
	)	
NEXUS COMMERCIAL PROPERTY MAINTENANCE	)	Docket No. **1,061,691**
Respondent	)	
AND	)	
	)	
CAROLINA CASUALTY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the August 28, 2012, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Chris A. Clements of Wichita, Kansas, appeared for claimant. Donald J. Fritschie of Overland Park, Kansas, appeared for respondent and its insurance carrier.

The record on appeal is the same as that considered by Judge Clark and consists of the transcript of the August 28, 2012, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Judge Clark ruled claimant suffered personal injury by accident on July 2, 2012, from shoveling gravel. He ordered respondent to furnish the names of two physicians from which claimant could select one for medical treatment.

Respondent raises five issues:

(1) Did claimant meet with personal injury by accident arising out of and in the course of her employment on July 2, 2012?

(2) Did Judge Clark exceed his jurisdiction by finding claimant sustained personal injury by accident arising out of and in the course of her employment on July 2, 2012, when

such allegation was not asserted by claimant in her Application for Hearing, her seven-day demand letter, her Notice of Intent or any other pleading?

(3) Did Judge Clark lack jurisdiction to hold a hearing on an alleged accidental injury arising out of and in the course of employment for a specific date?

(4) Did claimant meet with injury by repetitive trauma arising out of and in the course of her employment, including whether there was diagnostic or clinical testing to support a finding of repetitive trauma?

(5) Did claimant establish that the prevailing factor in her need for medical treatment was either repetitive trauma from her work activities or a work accident?

Claimant argues Judge Clark's ruling should be affirmed in all respects. Claimant asserts in her written argument that she suffered an accident on July 2, 2012, and was not injured due to repetitive use.[1]

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

In her Application for Hearing, claimant asserted injuries to her left hand, arm, shoulder and neck from "[r]epetitive use" on July 2, 2012, and each and every working day thereafter through July 15, 2012.[2]

At the preliminary hearing, claimant testified about experiencing left shoulder pain from shoveling and throwing more gravel than normal, and at a quicker pace, for about 90 minutes on July 2, 2012. Continued job duties through July 15, 2012, including use of a blower, caused her left hand, arm and shoulder to worsen, in addition to causing neck pain.

PRINCIPLES OF LAW

"The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."[3]

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[1] Claimant's Brief at 1 (filed Oct. 8, 2012).

[2] Application for Hearing (filed July 24, 2012).

[3] K.S.A. 2011 Supp. 44-501b(c).

K.S.A. 2011 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) “Repetitive trauma” refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. “Repetitive trauma” shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
>
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
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> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
>
> . . . .
>
> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

Judge Clark found claimant sustained personal injury by accident on July 2, 2012. This Board Member finds claimant would have proven an accident under the pre-May 15, 2011, law. However, legislative changes to the definition of "accident" require the preliminary hearing Order be reversed; the claimant did not have an accident under the new law. If claimant sustained an injury, it was from repetitive trauma, not from an accident. Further, proof of repetitive trauma requires claimant to demonstrate the repetitive nature of her injury through diagnostic or clinical tests. Claimant offered no such proof.

Claimant testified her shoulder injury was due to repetitive trauma, specifically from quickly shoveling more gravel than normal over a 90-minute period on July 2, 2012, as well as additional repetitive tasks through July 15, 2012. While it could be argued claimant's Application for Hearing sets forth a single accident on July 2, 2012, followed by repetitive trauma through her last day worked, the Application for Hearing specifically stated claimant was injured due to "[r]epetitive use."

Whether claimant sustained an accident also hinges on statutory changes concerning the definition of accident, along with the legislature's decision to have clearly delineated and separate definitions for "accident" and "repetitive trauma."

Old law, K.S.A. 2010 Supp. 44-508(d), stated:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. . . .

The new law, K.S.A. 2011 Supp. 44-508(d), states that an accident:

• must be traumatic;

• only refers to an event, not multiple events;

• must be identifiable by time and place of occurrence;

• must produce symptoms of an injury at the time and occur during a single shift;

• must be the prevailing factor in causing the injury; and

• shall "in no case be construed to include repetitive trauma in any form."

Plain and unambiguous workers compensation statutes must be applied as written.[4] "Traumatic" is an adjective describing "[a] wound, esp. one caused by sudden physical injury."[5] "Traumatic" is defined as "[c]aused by or resulting from a wound or any external injury . . . ."[6] The definition of an accident as "traumatic" may be inconsistent with statutory language that an accident not necessarily involve a "manifestation of force."[7] This Board Member is hard-pressed to find an example of a traumatic event not involving some degree of force.

Claimant's shoveling involved some degree of trauma. However, her shoveling over the course of 90 minutes is more akin to repetitive trauma. In any event, compensability in this case does not hinge on whether trauma or force was involved in claimant's injury.

The new definition of accident no longer refers to plural events that are undesigned, sudden and usually afflictive or unfortunate, but only refers to one such event, i.e., "an" event.[8] The prior definition of accident included both "event or events."[9] A change in the language of a statute generally means the legislature meant to change or clarify the law.[10]

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[4] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[5] *Webster's II New College Dictionary* at 1173 (1995).

[6] *Black's Law Dictionary* at 1500 (6th ed., 1990).

[7] K.S.A. 2011 Supp. 44-508(d).

[8] *Id.*

[9] K.S.A. 2010 Supp. 44-508(d).

[10] *Estate of Soupene v. Lignitz*, 265 Kan. 217, 220, 960 P.2d 205 (1998).

In this case, there was no undesigned, sudden and unexpected event to establish that an accident occurred. Claimant asserted in her Application for Hearing and through testimony that repetitive work caused her injuries. Quickly shoveling gravel over 90 minutes is not "an" event, but is rather cumulative traumas in line with the statutory definition of repetitive trauma.

Claimant established the general time and place, or the when and where, of her injury, and had symptoms of injury during her July 2, 2012, shift. However, merely because claimant satisfied part or parts of the definition of an accident does not mean she proved all necessary criteria to prove an accident.

Claimant simply did not present proof of an accidental event as causing her injury. Her Application for Hearing specifically stated she was injured due to "[r]epetitive use." The very definition of repetitive trauma includes "repetitive use."[11] Claimant's injury was due to repetitive trauma and not an accident.

The definitions of an accident and repetitive trauma are mutually exclusive. The new legislative changes do not allow the definitions of "accident" and "repetitive trauma" to be conflated: "'Accident' shall in no case be construed to include repetitive trauma in any form."[12] The only way that the claimant had an accident is if her repetitive use could be viewed as an accident. K.S.A. 2011 Supp. 44-508(d) specifically prohibits construing repetitive use as an accident.

Claimant was injured due to repetitive trauma. Her date of personal injury by repetitive trauma was July 15, 2012, her last day worked. However, whether claimant proved compensable repetitive trauma under K.S.A. 2011 Supp. 44-508(e) and K.S.A. 2011 Supp. 44-508(f)(2)(A)(i-iii) is more problematic.

Respondent argues claimant's case is not compensable because she did not demonstrate the repetitive nature of her injury through diagnostic or clinical tests. The statutory definition of repetitive trauma mandates that the repetitive nature of claimant's injuries be established through diagnostic or clinical tests, which has been interpreted as including even an examination by a medical professional.[13] Unfortunately, there is no medical evidence in this case, let alone medical evidence demonstrating the repetitive nature of claimant's injuries through diagnostic or clinical tests. Claimant failed to prove compensability because she did not demonstrate the repetitive nature of her injury through diagnostic or clinical tests.

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[11] K.S.A. 2011 Supp. 44-508(e).

[12] K.S.A. 2011 Supp. 44-508(d).

[13] *Wright v. Gear for Sports*, No. 1,058,254, 2012 WL 2890471 (Kan. WCAB June 8, 2012); *Goodson v. Goodyear Tire & Rubber Co.*, No. 1,057,615, 2012 WL 369788 (Kan. WCAB Jan. 20, 2012).

Claimant's testimony alone is sufficient evidence of her medical condition.[14] However, her testimony did not demonstrate the repetitive nature of her injury through diagnostic or clinical tests.

This Board Member's finding that claimant failed to establish compensability for personal injury by repetitive trauma because she did not demonstrate the repetitive nature of her injury through diagnostic or clinical tests renders moot the other issues raised by respondent.

The above preliminary hearing findings are neither final nor binding and may be modified upon a full hearing.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[16]

CONCLUSION

WHEREFORE, the undersigned Board Member reverses the August 28, 2012, Order entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of October, 2012.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
cac@cl.kscoxmail.com; rdl@cl.kscoxmail.com

Donald J. Fritschie, Attorney for Respondent and its Insurance Carrier
dfritschie@wallacesaunders.com

John D. Clark, Administrative Law Judge

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[14] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, Syl. ¶ 1, 61 P.3d 81 (2002).

[15] K.S.A. 2011 Supp. 44-534a.

[16] K.S.A. 2011 Supp. 44-555c(k).